Delivering Justice Before and After Transitions

Conclusions from Dialogues on Transitional Justice

2013
Freedom House
Rights and Justice Initiatives Team
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ACKNOWLEDGMENTS

*Freedom House* acknowledges and thanks the individuals and organizations who assisted in planning and implementing this event on Transitional Justice (TJ) in Pre- and Non-Transition Contexts, the first in a series of global Practitioners’ Dialogues on Transitional Justice that examined challenges and opportunities to the rapidly evolving field of practice surrounding TJ. In particular, Freedom House would like to thank its partner for this event, *No Peace Without Justice*, which worked with Freedom House to develop the agenda, participant list, explore the specific subject matter, and facilitate and participate in the Dialogue. Their contributions were essential in making this event a success. Significant appreciation is expressed to the United States Agency for International Development (USAID) whose financial support allowed this event to take place. This support is helping to continue advancing the field of TJ. Our thanks also goes out to the individuals and organizations who participated in this event, sharing their own experiences and those of their country, region, or global community in working to provide redress for massive human rights violations. Their work is both inspirational and essential, and we look forward to continued collaboration in this area.

OVERVIEW

Societies moving away from repressive rule have employed TJ mechanisms to achieve justice, truth, rule of law and durable peace.¹ In countries where transitions are forthcoming, where totalitarian or authoritarian regimes are in power, domestic, regional and international civil society actors are faced with an extraordinary challenge of creating or widening a political space to permit a transition while taking stock of ongoing violations. This challenge, which can arguably be referred to as specific to the 21st century,² prompted us to take a closer look at strategies available to practitioners in restrictive contexts by identifying successes, challenges, and lessons-learned from closed as well as transitional societies. This focus on the applicability of TJ tools and strategies in pre- and non-transitional societies is new and under-researched, and we believe that this Dialogue will only be the beginning of a systematic effort to explore the topic further.

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SUB-QUESTIONS AT THE CENTER OF THIS CONFERENCE INCLUDE:

1) Can any of the main goals of transitional justice – accountability, acknowledgment, truth-telling, reparations, reconciliation, institutional reform and memorialization – be achieved in the pre-transition and non-transition contexts? If so, to what degree and how, and what might follow?

2) What mechanisms, tools, and lessons-learned can be shared among practitioners to accelerate or undergird transitional justice processes that secure normative change?
In June this year, twenty human rights lawyers, civil society leaders, commissioners, judges, academics, donors, and representatives of the United Nations (UN), the African Union (AU) and USAID with a wide variety of experiences world-wide came together in Istanbul to provide answers to the main question that guided the Dialogue: what TJ strategies can provide redress and enhance political openings in restrictive contexts and how can the impact of these tools be enhanced where political leaders employ them only formally? Freedom House and No Peace Without Justice convened this three-day gathering to test assumptions and draw conclusions based on real life experiences of experts and activists in advancing TJ goals in pre- and non-transition contexts and avoiding the pitfall of employing TJ institutions and policies in transitioning society only to cement previously committed injustices.

**IS (TRANSITIONAL) JUSTICE POSSIBLE IN PRE- AND NON-TRANSITION CONTEXTS?**

The foremost dilemma we faced in conceptualizing this event was whether TJ mechanisms are at all possible in societies where transitions have either stalled or are forthcoming. Is it an oxymoron to claim that TJ is possible without a transition? The experiences of our partners and civil society world-wide – who have already been using the tools of TJ in restrictive contexts – prompted us to think outside the box.

The process of confronting the past is otherwise known as TJ. The concept itself implies a change: a change from conflict to peace, a change from authoritarian rule or totalitarian regime to democracy, a change from widespread human rights violations to a culture that respects and promotes human rights. But can the scope of TJ also include the process of confronting the present and the past that will not pass? Is it possible to advance the goals of TJ in the absence of a complete transition or any type of transition at all? Is TJ possible when the same leaders or political groups are still in power? When a conflict is ongoing? When the underlying issues and grievances that fueled human rights abuses have not been addressed? When victims continue to be targeted and harmed? When a country is beginning to shift toward more open governance and respect for human rights but the commitment to this change is not yet solidified? These are the questions that practitioners grappled with during this event and that the field of TJ will continue to explore in the years to come.

Political justice in transition is not a 20th century invention; the term itself, however, is. TJ as a term emerged in the early 1990s. Originally, TJ was understood as a set of judicial and non-judicial measures implemented to redress the legacies of massive human rights abuses and was applied in transitional moments, such as the collapse of a dictatorship or military regime. The first such case in modern history was the Nuremberg Military Tribunal, which was set up in 1945, followed by “the second phase of TJ.” This second phase, which was sparked by a wave of liberalization that began with the transitions in the Southern Cone of South America in the late 1970s and early 1980s and continued throughout Eastern Europe

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3 Columbia University Law and philosophy professor Jon Elster argues that TJ is as old as democracy and he traces it back to 400bc in his seminal work Closing the Books.

4 In the words of the New York University Law Professor Ruti Teitel
and Central America after 1989, expanded the scope of TJ to reach beyond retributive justice model (judicial measures) and to include restorative justice institutions such as commissions and institutional reform policies such as lustration and vetting.

In the current (or third) phase of TJ, the implementation of TJ institutions and policies has been “normalized” and the responses to the past have been more innovative than ever before. So much so, that it can be argued that the TJ paradigm – strengthened by the Nuremberg and Tokyo trials, the Hague and Geneva Conventions, the International Covenant on Civil and Political Rights, and emerging human rights movements – is capable of confronting the present as well the past. Most recently, we have seen an emergence of international, regional and domestic efforts to deliver/achieve at least some form of justice prior to transitions. These attempts, by definition independent from governments, have a more narrow scope of addressing violations in restrictive contexts: they can provide some redress for individual suffering, document personal stories, and even occasionally prosecute perpetrators, but they cannot focus on political structures that give rise to human rights violations. Still, they may be thought of as precursors to meaningful political transitions, or, as one Dialogue participant said, “The work we do is preparatory!”

LEARNING FROM EACH OTHER: MAKING SENSIBLE COMPARISONS

Given the multitude of country contexts and factors that impact the selection of TJ mechanisms and policies, we have not underestimated the importance of determining the appropriateness in comparing select cases represented in our Dialogue. A comparative analysis enabled us to avoid starting anew and instead allowed us to build upon others’ relevant experiences and impact, whether negative or positive, thereby empowering us to further improve the tactics of confronting the present or the past that will not pass.

The Dialogue among representatives from Afghanistan, Bahrain, Burma, Cote d'Ivoire, Iran, Kenya, Kyrgyzstan, Libya, Mexico, Uganda, South Africa, Sudan and South Sudan, Syria, the former Yugoslavia, and Zimbabwe confirmed our assumption that starting anew is possibly the worst option. The conclusions reached highlighted the importance of making sound and careful comparisons, while respecting the uniqueness of each context, as the optimal way forward in ending impunity.

Possibly the most obvious and still profoundly convincing reason for conducting comparisons is that the social groups affected and those causing harms share commonalities, regardless of their political, ethnic or religious contexts. The community of victims in each of these societies seeks truth, justice, acknowledgment, reparations and

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5 These include: International military and ad hoc tribunals, domestic courts, the ICC -- the world’s first permanent court, truth commissions, commissions of inquiry and UN human rights commissions, lustration and vetting, opening of secret police files, reparations programs, and memorialization efforts as well as unofficial institutions from the non-governmental sector designed to advance human rights.

6 Civil society practitioners present at the event included individuals who have and continue to work to advance the goals of TJ, while others worked to advance components of TJ through documentation, strategic litigation, advocacy, truth seeking, and working with victims. Additionally, regional and global experts and academics participated to share their comparative experiences.
reforms, whereas perpetrators, similarly, share with each other across continents, their aims of achieving impunity – to be shielded from the reach of law, protect themselves from public scrutiny and continue to benefit from their crimes. Bystanders also share characteristics with each other, universally and almost regardless of their circumstances: they deny the simple moral fact of crime and their own responsibility by engaging in strategies of self-deception, relativization, or normalization of mass atrocity, by remaining silent in the face of injustice and passive in response to their compatriots’ suffering. Finally, these societies have in common the dissidents (the reformists and activists) who are the agents of change, the protectors of rights and instigators of TJ processes worldwide. This group, represented at the event by the practitioners who were present, has the ability to work in partnership with the community of victims and other likeminded individuals, groups, and institutions, to achieve justice, truth and reconciliation. This event sought to allow such activists and experts to share experiences as a way to elevate understanding of and contributions to TJ as a field in these difficult contexts.

**LEGAL STRATEGIES TO ADVANCE TRANSITIONAL JUSTICE**

While each participant at this event worked in a country or region that has experienced massive human rights violations, each also worked in a unique context. The importance of context was highlighted during the very first session discussing the possibility of using legal strategies as a tool to advance TJ. In some countries, prosecutions and civil cases were possible and could be successful; in others, international justice seemed more appropriate; other countries could not utilize domestic courts to advance accountability but instead focused on building capacity of legal activists and creating pressure to reform the justice sector. While legal strategies were very different, it was agreed that they were an important tool in pre- and non-transition settings, or as one of the practitioners highlighted, “We try to achieve some accountability by representing the powerless and shunning the powerful.”

**DOMESTIC COURTS CAN ADVANCE ACCOUNTABILITY**

Although domestic justice and accountability may seem impossible to achieve in authoritarian countries or those experiencing conflict and human rights abuses, that is not always the case. A number of strategies have been attempted and often successfully implemented that achieve some form of accountability even before a transition. Lawyers play a strategic role using domestic legal procedures to change the equations, long before transition or a normative change occurs. Human rights lawyers achieve some form of redress by protecting the rights of victims, carefully selecting human rights violations cases and bringing them before courts, using loopholes in domestic legal frameworks to bypass amnesty laws, strategically pursuing, when appropriate, corruption cases to remove human rights violators from positions of power, and relying, when possible, on regional precedents or international norms and standards, thereby setting in motion and constructing new norms that challenge old and current standards tolerant of impunity.

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7 In Mexico, for example, civil society’s strategic litigation in combination with social protest proved to be very effective. The movement of the victims of violence in Mexico has led to positive reactions from the authorities in the investigation of cases and the enactment of laws to extend the protection of victims’ rights.
THREE CASES OF MASSIVE HUMAN RIGHTS VIOLATIONS, THREE VERY DIFFERENT CONTEXTS: EXAMPLES OF HOW CIVIL SOCIETY HAS USED LEGAL STRATEGIES TO ADVANCE TJ IN PRE- AND NON-TRANSITION CONTEXTS

ZIMBABWE:

Background: Since the 1990s, the ZANU-PF has led brutal campaigns to suppress political dissent, and what was recognized once as an independent judiciary has atrophied.

Strategy: Civil society in Zimbabwe pursued strategic litigation both to seek accountability now in a pre-transition context and end impunity of egregious human rights abuses as preparatory work in hopes that comprehensive transitional justice will be possible in the future and this first step becomes “of record.”

Successes: Through litigation in domestic courts, civil society has represented powerless individuals before transition and won cases against high level government actors thanks to courageous judges. These efforts help re-constitute some of the broken links of solidarity among the citizenry.

Challenges: The biggest challenge is the failure to enforce or implement these favorable court orders. This failure causes people to lose faith in the system and resort to taking matters into their own hands or suffer in silence. Additionally, the government has not respected the ruling of regional courts despite successful cases in the SADC Tribunal. Another shortcoming is that domestic judges rarely write what is the reasoning for their decisions and thus lessens the precedential value.
BAHRAIN:

Background: Mass social protests during the Arab Spring led to a brutal crackdown on demonstrators that continues today with new rounds of arrests and detentions and Bahraini courts uphold life sentences for opposition leaders. With no separation of power between the judiciary and executive, the justice system is used to punish protesters with harsh sentences. Independent lawyers feel that their assistance cannot make a difference and in a number of cases, their representation puts them at risk of illegal detention.

Strategy: The government in Bahrain cares about international perceptions. Civil society has worked to raise awareness about challenges to the rule of law in an effort to exert pressure from the outside, including through the UPR mechanism. Additionally, defense lawyers have threatened to strike as a way to demonstrate the illegitimacy of the system.

Successes: Although viewed with some controversy, a Bahrain Independent Commission of Inquiry (comprised of reputed international human rights leaders) conducted an investigation and publically issued an extensive report on violations with recommendations for redress. Outside criticisms, for example those from Australia have had an impact.

Challenges: At the moment, domestic courts cannot be used to hold people accountable because of lack of independence and use of court-appointed defense attorneys who fail to provide a real defense. People believe that if they are accused of a crime, they will be found guilty no matter what.

SYRIA:

Background: Syria’s civil war has produced tens of thousands of deaths and millions of refugees. The rule of law has deteriorated greatly, and the Assad regime has used the legal system as a way to validate their human rights violations. Legal practitioners inside the country are few and are targeted by the regime, lacking visibility and support.

Strategy: Civil society has used three primary legal tools outside of domestic courts to push for accountability: 1) using mock trials to increase legal capacity and highlight problematic procedures; 2) training those documenting human rights abuses in evidentiary standards so information can be used in courts in the future; 3) looking to the ICC and international legal action in other jurisdictions. They are playing the long game.

Successes: Despite extremely restrictive environment, legal capacity is being built and evidence is being gathered.

Challenges: Very few legal activists are left in Syria; although they are documenting abuses, they are losing the support of the people. Syrians are very focused on accountability but not on the preservation of legal institutions. Domestic trials are not a viable option. More support for these programs is needed. Decree 56 grants immunity for security officers.
Prosecutions, even if limited in scope and number, facilitate changes in peoples’ perceptions about the invincibility of perpetrators. This may serve as a short-term goal that significantly improves the possibility for positive changes to occur long-term. Successful and targeted human rights lawyers’ strategies can lead to changes in domestic legal frameworks (domestic penal code), make it more likely that constitutional changes and judicial reform will occur, that international norms will be upheld in practice (not just rhetorically), and that the suffering of the community of victims will be acknowledged and compensated, including having their rights rehabilitated, their standing within the society repaired, and the harms suffered appropriately memorialized.

In Afghanistan, where a lack of legal aid can impact the ability of individuals to pursue a human rights-related court case, the Afghan Independent Human Rights Commission has represented victims in court and has assisted defense lawyers by detailing the kinds of documentation that will be required to present the case.

Lawyers are not the only important factor; judges themselves play a critical role. In the best case scenario, both the judges and lawyers are independent, but that is not always the case. However, even in the most restrictive settings, examples of progressive decisions by judges create an important precedent. In some cases, activist judges can work to promote human rights even in the most difficult settings: in Syria, for example, civil society has taken note of cases where judges place individuals in prison for short periods to protect them from being tortured by security agents. A Libyan judge who participated in the event explained that a good judge can rectify a bad law, while a bad judge can work to make good laws bad; He noted since the role of judges is critical, civil society should push for their independence, both politically and financially, and support judges who do the right thing.

**MONITORING TRIALS CAN STRENGTHEN ADVOCACY**

Practitioners identified the important role that civil society and other national actors can plan in monitoring trials. Such monitoring can both put pressure on judges and lawyers to perform appropriately and can also bring domestic and international awareness to unfair trials, creating an important advocacy platform for improvements in rule of law.

In Kyrgyzstan, civil society has been very active in monitoring trials particularly in cases of ethnic minorities that may not be afforded a fair trial. In Afghanistan, the Afghan Independent Human Rights Commission monitors trials to keep a credible, independent watch on the courts. In Libya, a network of lawyers is working to monitor trials both domestically and internationally to ensure the new way forward is that of fair trials.

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8 Use of regional human rights courts, i.e. the Inter-American Court for Human Rights to promote claims of state responsibility which could later be converted to individual criminal responsibility processes (Guatemala trial of Rios Montt for genocide and crimes against humanity). Use of domestic courts elsewhere, i.e. via universal jurisdiction or the ATCA in the US. Some processes in lieu of any expected domestic proceeding, others seem designed to prompt one. Less successful: use of UN Human Rights Council, or the UN Security Council where states play successful diplomacy game: (i.e. Sri Lanka and Syria).
that “criminal prosecutions to date were most often conducted in domestic courts,” the importance of local civil society monitoring efforts cannot be overstated.

Some practitioners highlighted the relevance of international actors in monitoring and commenting on unfair trials in human rights and political cases. External actors may be best placed to comment on the validity of court decisions safely, since domestic lawyers do so at great risk. The United Nations Special Procedures can be particularly helpful in this area, as most leaders are extremely concerned about their image and how they are being perceived in the international arena.

**Even a Loss Can Be a Win**

In the midst of violence or repressive rule, it is very difficult to expect justice to be delivered. At times, the focus on legal strategies can be useful even if cases are not actually won. For the present, awareness that legal capacity exists and that individuals and organizations are pursuing justice and truth may provide incentives for actors to reduce violence for fear of exposure and of future judicial proceedings once a transition occurs. Negative decisions in domestic courts can also be used to demonstrate to the international community how bad things are and that action must be taken. For the future, even unsuccessful legal actions can put important evidence into the public record and judges who fail to uphold the law or abuse it are identified – both can be used later for prosecutions, by truth-seeking mechanisms, or for vetting purposes of a new judiciary.10

**Unofficial Institutions Can Be Alternatives to Domestic Courts**

For countries where domestic courts do not have the capacity, independence, or will to push for accountability to fight impunity for human rights violations, legal efforts can still be made to advance the TJ goals of accountability and truth. Accurate and timely collaboration in amassing and sharing evidence increases the pressure for protection, redress, and the ability to link perpetrators to violations, since it can be much harder to gather evidence years after violations occur. Additionally, these can be combined

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9 David Backer’s “Cross-National Comparative Analysis” in Assessing the Impact of Transitional Justice: Challenges for Empirical Research, p. 28 (23 – 72)

10 In Chile, although the vast majority of the 10,000 habeas corpus petitions regarding detained and disappeared individuals were not approved by the courts, the documentation of evidence they produced later formed the foundation for Chile’s Truth Commission and other truth-seeking efforts.

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**The Iran Tribunal**

While an official trial for crimes against humanity in Iran is impossible in the current context, a non-binding tribunal was led by civil society and legal experts in 2012 to investigate allegations of massive human rights violations in Iran’s prisons from 1981-1989. Taking place in The Hague, well-known international lawyers and judges examined evidence of crimes against humanity and gross violations of human rights. While the government of Iran did not attend to defend itself, the trial proceedings were streamed into Iran online and documentation of evidence was preserved with the hope that one day a binding trial could take place.
with creative ways to build capacity of domestic lawyers and human rights defenders, including carrying out mock trials to examine human rights abuses (as was the case in Syria and Iran). At times, they involve international lawyers in working on these cases.

While international tribunals and international legal cases in other jurisdictions were not specifically touched on during our Dialogue, practitioners did note that regional mechanisms (including the SADC Tribunal or the Inter-American Court for Human Rights) can inspire domestic processes, bring publicity, and create international support. The practitioner from Mexico cited the Rosendo Radilla case, which examined a forced disappearance in Mexico in the Inter-American Court of Human Rights, as such an example.

CONTEXT AND LOCAL DEMANDS MATTER MOST
As is the case in all international development work, local contexts and demands are critical when considering legal strategies. If strong domestic initiatives exist, as in the case of Zimbabwe, these should be supported and not competed with. In countries such as Afghanistan where the international community is taking the lead on reforming the judiciary, concerns have been raised that some international advisors are not sufficiently consulting the local population, which creates the perception that they think they know the country better than the locals. Local people need to be involved in the process to ensure sustainability and ownership, both essential to the long-term success of reforms. Lastly, models are not universally applicable, and strategies must reflect local parameters, needs and expectations. As one practitioner from Syria noted, the international community can help but it should not try to impose international standards without providing enough assistance and pressure to really make a difference rather than just propose a temporary solution that does not produce long term results.

HUMAN RIGHTS DOCUMENTATION
Local civil society organizations (CSOs) have played a critical role in securing and preserving evidence of past and ongoing abuses, making information accessible to the public and mobilizing the domestic and international community to respond. Accurate and timely collaboration in amassing and sharing evidence increases the pressure for protection, redress, and the ability to link perpetrators to violations. Nevertheless, human rights defenders, witnesses and victims face grave physical and data insecurity. Additionally, victims and witnesses can become tired of giving statements and re-living their trauma, particularly if they feel that they are not achieving any redress for their suffering. Practitioners examined the challenges relating to undertaking documentation in pre- and non-transitional situations during this Dialogue and discussed how they have been able to conduct documentation despite the limitations.

SECURITY OF DOCUMENTED INFORMATION AND MONITORS IS ESSENTIAL
Civil society’s role in documenting human rights abuses becomes all the more important during pre- and non-transition periods when violence may be widespread or there may not be political will from the state to conduct documentation itself. From publications like “The Kosovo Memory Book” in the former Yugoslavia to the Nunca Mais report produced in
Brazil, civil society has a history of documenting and publishing abuses even in the absence of political will or during pre- and non-transition periods as a way to contribute to learning about situations of violence, expose perpetrators, detail ongoing crimes, and advance truth. Additionally, even unpublished documentation of human rights violations can be critical for redress following a transition. Many practitioners present at this event had significant firsthand experience conducting human rights documentation in environments such as Syria, DR Congo, Sudan, Sri Lanka, Iran, Bahrain, Afghanistan, and more, and they outlined their strategies for secure documentation that would protect both those documenting and those providing information.

**Strategies for documenting securely:**

- *Distance frontline monitors who are collecting information from the organizations disseminating that information to the public and other actors.* In dangerous settings, the identity of monitors must be kept anonymous to ensure their safety and ability to continue monitoring. As a result, organizations must take precautions so monitors are not identified through associations with those publishing the information being gathered. One of the strategies includes setting up front organizations to gather, analyze, and distribute the information.

- *Use innovative technologies to underpin documentation.* In Sudan, satellite networks are being used to show images of the situation on the ground in real time and before and after atrocities. This can both create a warning to monitors to interview people in affected areas or it can provide photographic evidence to document atrocities. These photos make it extremely difficult to deny atrocities and can be used as an early warning system to prompt response by a variety of actors.

- *When documentation is not possible in-country, there are other alternatives.* Even in countries such as Iran and Sri Lanka, where on-ground documentation is almost impossible, human rights documentation can still take place. Practitioners noted the internet as a very important source of information, whether through Twitter, blogs, Facebook, or other sources. Additionally, refugees and diaspora can provide accurate information to human rights monitors.

- *Social media can be an important tool for dissemination of information.* Syrian practitioners highlighted their use of social media like Facebook as a way to disseminate and discuss documented cases of human rights violations, in particular by using videos and photos. Dangers on the ground push activists to use proxy-breaking software, and activists avoid having physical copies of documentation with them.

- *Journalists continue to play an important role.* In a time when the nature of journalism is rapidly changing, journalists still play an important role in disseminating information. In Syria, civil society organizations have relied on journalists to transfer hard copies of documentation through numerous check points.

- *Learn from other experiences.* Syrians have watched the strategies and impact of monitoring in other Arab Spring countries like Egypt and Tunisia and have used these lessons learned to tailor their strategy.

**Challenges and lessons learned:**

- Often documentation is done with a focus on raising awareness; however, information documented often lacks legal analysis and is often not gathered using
evidentiary standards. Organizations who hope to use information for legal proceedings need to be aware of domestic and international evidentiary standards and train monitors on those standards.

Verifying information is an important component of documentation. Unverified information can lead to fictitious or regime-produced videos being made public and then being used to discredit CSOs doing documentation and advocacy work. Additionally, domestic, regional, and international actors often have unverified documentation in their possession, but they cannot act on that information without confirmation that such events took place. Verification can, however, be very difficult in situations where the transfer of data is dangerous and internet/phone connectivity is inconsistent. Organizations need to work with monitors and others to verify all content before it is disseminated or be clear when information is not yet verified. In Darfur, one practitioner explained that his organization employed lawyers as monitors to ensure that documentation would be verifiable and evidentiary.

Ensuring that all names are redacted can be very time consuming, but failure to do so can put lives at risk. It is essential that organizations have the human resources needed to redact any potentially damaging information.

Both physical and cyber attacks are common threats faced by documenters. Organizations need significant training on these threats and need to be made aware of emergency support resources.

Counter-messaging by regimes in power has been a major challenge in some contexts, including Iran. This has included significant funding for counter-messaging and trolling accounts of human rights organizations. It is very hard to fight this type of messaging due to a lack of resources and funding within civil society. In Sudan, a practitioner argued that there is a state-sponsored cyber-army, which creates a huge challenge to civil society. Documenters need to be prepared for this challenge.

A lesson learned for organizations relatively new to documentation was that just videos, photos, and facts may not be enough: narrative stories play an important role in helping the viewer/reader understand the broader picture of what is happening. It is important to design trainings for monitors around the types of stories they should tell.

A major roadblock is a lack of resources for phones, internet, and other resources that allow for secure documentation. Funders should ensure that documentation programs have sufficient funding for equipment and appropriate security training, both physical and digital.

Because documentation can be very dangerous, especially for monitors in countries such as Syria, where disappearances through arrests and violence are common, it is important that a network of monitors is created and that coordination exists between organizations doing documentation so that there are no gaps in monitoring.

A new challenge noted recently is the expectation of citizen journalists to be paid for the information gathered. News agencies’ practice of paying for videos creates an expectation that videos will go to the highest bidder, which may also include illegitimate actors aiming to prevent documentation from being disseminated. Civil society needs to raise awareness about the dangers this practice poses and should not seek payment for videos.
In countries where extensive documentation has taken place and yet there has not been significant international response, such as Syria, people are losing faith in documentation as an important tool.

People doing documentation need to take care of the people from whom they are gathering information. Practitioners should ask themselves how to avoid re-victimization of those giving testimony. When planning documentation efforts, monitors should think about the resources that can be provided to victims, including psycho-social support (especially in environments where atrocities were widespread such as Northern Uganda).

**DOCUMENTATION KEEPS MEMORY ALIVE**

Being that human rights documentation is a very difficult and often dangerous task for the reasons highlighted above, the question arises: Why document? Simply gathering information is necessary but not sufficient. What are the short term and long term uses for this information? Can it be used to prevent additional violence? Will it be used as evidence in court cases, to steer prosecutors to the right information, to inform the public about the truth of past events, or all of the above? Having a clear intent in mind for the ultimate uses of information is critical for a successful documentation project. Documentation and dissemination must be strategic. Human rights documentation can be used for a variety of purposes, including awareness raising, promoting accountability, and as evidence in court. CSOs must keep the purpose of their documentation in mind, as that will ensure that the reports, briefs, and advocacy they produce is tailored to the appropriate audience. Practitioners outlined the following purposes for documentation:

- **Early warning and response** – If documentation is coupled with timely verification and dissemination, it can assist actors in pushing for a response to prevent additional human rights violations. However, practitioners noted the tension between wanting to get the information out as quickly as possible and possibly being criticized as the “boy who cried wolf;” this concern may make actors more conservative regarding pushing for response to violations before extensive documentation has taken place.
- **Evidence in court** – When possible, documentation should be made in accordance with evidentiary standards so that it can be used by domestic, regional, and/or international courts to support efforts for legal accountability.
- **As guidance or “lead evidence” for prosecutors** – In many cases, documentation can be used to guide a prosecutor, giving them information about where to look for evidence and who to interview. This can be a good role for civil society documentation, especially when organizations do not have the capacity to document at an evidentiary standard.
- **Advocacy** – Many practitioners discussed the ways they use documentation for advocacy at international and regional bodies, using a boomerang effect to put pressure on local actors. For example, activists documenting abuses in Myanmar use advocacy because access to justice locally is not a viable option for the materials they have. This advocacy includes reports, letters, white papers, contributing to the UPR, working with the Special Mandates, and working within regional bodies. This advocacy can also include pushing bodies like the UN Security Council to refer the case to the ICC, as was the case in Libya.
- **Outreach** – Documentation is used to raise awareness within the population of a country that has experienced violence, increasing access to the truth, strengthening resolve
for accountability, and supporting democratic efforts to end or come to terms with atrocities.

It is important to remember that documentation of atrocities and human rights violations, even if it is not used immediately, is still valuable. While some contexts allow documentation to lead to responses by domestic and international actors, in other cases it may take years or even decades for documentation to produce a result. However, that result can be of critical importance. Practitioners cited the recent Mau Mau case regarding Kenya in British Courts and the use of video documentation in the trial of General Rios Montt in Guatemala as examples of documentation playing a vital role in pushing for accountability even 30, 40, or 50 years after atrocities had taken place.

TRUTH-FINDING MECHANISMS
Exposure of the truth is one of the fundamental goals of transitional justice. Although, obvious questions arise as soon as the concept is brought up, (such as: Whose truth? Is there more than one truth? Truth about what? etc.) which may suggest that the answers are relative, we believe that this is not the case and that a normative baselines can and should be established; this is well captured in the words of Martha Minow who claims that “some versions of the past [or present] are wrong, . . . [and that] failure to remember can impose unacceptable costs.” Thus, truth-telling and truth-seeking can be said to disqualify the “logic” behind violations, help build new political identities based on historical fact, (re) establish dignity of individuals and groups by allowing them to tell their stories and acknowledging their suffering, and transform victims into survivors.

It is essential that supporters of TJ realize that a successful truth-seeking process allows individuals and groups to look at the information being shared and see some of their own experiences in it – this both validates their own experience and validates the narratives of others whose stories constitute a larger, shared truth. This also allows society to counter perpetrators’ justifications, fabrication and denial of violations.

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11 For more information, see Pablo de Greiff’s August 28, 2013 report (A/HRC/24/42) p. 5-6
12 Marth Minow’s “Innovating Responses to the Past,” in Burying the Past . . . , p. 98
Truth-seeking mechanisms such as commissions of inquiry, human rights commissions, and truth commissions are designed to establish facts about the past through documenting human rights violations, providing evidence-based interpretations of their causes and consequences, outlining the patterns of crimes and analyzing institutional responsibility that serves as a basis for providing recommendations for reform, fully describing human rights violations. As Audrey R. Chapman argues in her “Truth Finding in the Transitional Justice Process”, commissions are complex undertakings not only because “documenting the truth about the past [is] an overwhelming and inherently controversial task”, but also because they require “collection of the appropriate data, accompanied by analysis and interpretation using sophisticated social science methodologies.”

In cases where transition is stalled, limited or yet to come, civil society including non-governmental and religious organizations are sometimes in a position to conduct investigations into human rights violations themselves or advocate for the state to do so.

**QUESTIONS TO CONSIDER WHEN THINKING ABOUT THE POSSIBILITY OF A TRUTH-FINDING MECHANISM**

- What are we trying to achieve?
- In light of our objectives, which type of mechanism would make the most sense (COI, TRC, etc.)?
- Will the process include significant consultation with victims and the local population about what accountability, truth, and redress should look like?
- How are minority views incorporated?
- Should it be a national, international, or hybrid process?
- How will members be appointed?
- What timeframe will it examine? Geographical scope? Types of crimes?
- What is the length of the mandate?
- What is the mandate? What are the procedures?
- Will names be named?
- Is this part of a broader political or social objective?
- Who is funding the commission and report?
- What do we want from the report, understanding that it is a means but not an end?

**COMMISSIONS OF INQUIRY CAN BE VIABLE ALTERNATIVES IN RESTRICTIVE CONTEXTS**

Domestic and international commissions of inquiry (COIs) were examined by practitioners and highlighted as a possible vehicle to expose the truth about widespread human rights violations and create conditions for a political transition. Practitioners shared successes and lessons learned from COIs or discussions about the possibility of creating COIs in countries where they worked:

**Bahrain**

Lesson Learned: COIs must be impartial and supported by implementers; process cannot be top down, and the local population must feel ownership over the results.

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13 For more about commissions, see *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, p. 97 (91 – 113)
This COI was created by the king, and practitioners felt that it was designed to appease the international community (a practitioner called it “a smoke screen”) rather than addressing the problems on the ground. Despite commissioners who were internationally respected, the legitimacy and independence of this body was questioned because it was funded by the king. While the government of Bahrain accepted the recommendations from the COI, the real issue is the lack of implementation of those recommendations. Bahraini civil society accepted the report because there did not appear to be other options, given the repressive environment.

**Uganda**

Lesson Learned: Political will is essential for recommendations to be implemented, and when they are implemented, this information needs to flow down to victims and the general population so they can take advantage of programs designed to provide redress.

Uganda had two COIs: the first was established in 1974 by Idi Amin to examine the period of 1971-1974 and was designed to investigate disappearances and to recommend SSR. Although 575 witnesses were interviewed, due to a lack of political will, recommendations were not implemented and commissioners faced retaliation. The report had no impact and human rights abuses actually escalated. The second COI was created in 1986 by President Museveni to investigate human rights violations from 1962 until 1986. Recommendations were implemented, thanks to political will, including a new bill of rights and reparations for victims. However, the report was not sufficiently publicized and victims did not know about the reparations they were eligible for until it was too late and the time period of eligibility had ended. Uganda is now considering a third truth-seeking mechanism.

**Syria**

Lesson Learned: International COIs can only do so much; if they lack access to citizens and there is no political will to implement their recommendations, they can work to publicize the truth but the reports will not have as much of an impact overall.

The Syrian COI began investigating in August 2011 and has produced several reports, exposing massacres and the use of chemical weapons. However, commissioners have not been allowed into Syria to interview victims and must rely on tools such as Skype. For the COI to be truly effective, Syrian participants felt that the UN Security Council must pass a resolution to ensure that commissioners could enter Syria to conduct investigations and that reports and information would be shared with the ICC. Practitioners were concerned that the COI has not reported on certain massacres. Syrian civil society organizations and documentation organizations are currently working with the COI, because they see the COI as one of the only options to expose the ongoing human rights violations.
**Kyrgyzstan**

Lessons Learned: COIs must report on all victims and cannot expose crimes only against one ethnic group. If they are not objective, the information they share will not be as impactful in exposing the truth or producing responses to prevent future violations.

Kyrgyzstan has had four COIs, which have focused on specific ethnic groups while leaving out information about others. They have failed to spark a national conversation or prompt responses from the government to prevent future human rights abuses. Despite civil society’s production of a separate report, political will is lacking to implement recommendations.

**Myanmar/Burma**

After 50 years of military rule, a COI was recommended for Myanmar/Burma in March 2010 by the UN Special Rapporteur, and 16 countries had endorsed this recommendation by November 2010. However, the push for a COI has faltered in the wake of reforms led by the Burmese government in 2011, and now the Special Rapporteur is suggesting a truth commission rather than a COI. Practitioners outlined both challenges and reasons to support a COI in Burma:

Challenges for a COI in Burma include: lack of political will; recent government investigations into human rights abuses have not been impartial and government has not shown dedication to reforms or truth-seeking mechanisms so a domestic mechanism might not be sufficient; abuses and violence is ongoing; commissioners are not impartial; recent domestic investigations have not resulted in accountability; states at the UN lack political will to push Burma; it will be very hard to define scope, geographic breadth, and timeframe of a Burmese COI due to the complex history of human rights violations; there is no guarantee that a COI would be allowed to investigate inside Burma, which could limit its efficacy as was the case for Syria; better alternatives may exist to expose the truth about human rights abuses.

Reasons a COI could be an important step to promoting truth in Burma include: a COI now could push the government to prevent human rights violations and pursue TJ goals; a COI would establish facts about violations and identify possible remedies; creation of a COI can be some form of acknowledgement for victims and can amplify victims’ voices; a report on human rights violations would show the population that something is being done to address human rights violations; in the absence of judicial independence, there is a need for an independent mechanism to expose truth and push for accountability; and a COI could leverage international attention on the country to push for positive change.
Even Unofficial Truth Commissions Play a Role in Truth-Finding

While truth commissions (TCs) are widely known for their work after a transition, this same mechanism can also be useful pre-transition to raise public awareness about the violations, establish the truth and build a comprehensive historical narrative of what happened and push for action. TCs are designed to create a comprehensive database (list or registry) of victims so as to provide conclusions about possible material and symbolic individual as well as collective reparations, create a platform for public hearings of the victims and perpetrators, and publish a final report with conclusions and recommendations to set up long-term mechanisms to acknowledge, memorialize, and deter future crime. While these mechanisms are often state led, which makes them difficult to implement during pre- and non-transition settings in which the government or ruling elites have not changed, there have also been examples of successful civil society led TCs that exposed systematic human rights violations and gave a voice to victims. Both official and unofficial processes were examined by practitioners at this event.

Experiences of a Commissioner from the Un Commission of Inquiry on Cote d'Ivoire

In the post 2010 election violence, which was the culmination of a protracted internal strife, more than 3,000 have been killed and hundreds of thousands have been displaced. Following the start of President Ouattara's administration, there was significant political will to reconfirm the legitimacy of his government by working with the international community, so the UN-mandated COI into post-election violence received full access to documentation. However, it did face restraints created by the UN: 1) the mandate was limited to the post-election period and did not allow commissioners to examine the previous decade, which played a role in the violence; and 2) the Commission only had about six weeks total to operate. Both – the breadth and timeline – constituted significant limitations, although there had already been previous UN investigations and a large peacekeeping mission reporting on human rights issues.

The Commissioner who participated in this COI outlined some positive and negative results. On the one hand, the creation of a national Truth and Reconciliation Commission (TRC) was a response to a COI recommendation; it drew attention to the abuses, its Special Investigative Unit was mandated to pursue criminal accountability and its Human Rights Investigative Unit conducted interviews with victims throughout the country, wrote a detailed report which was submitted to the president and which named perpetrators from both political parties for committed crimes. However, the TRC was entrusted to a former prime minister, is extremely bureaucratic (the hierarchy paralyzed the commission), the Special Investigative Unit has only pursued perpetrators from one party and is not well informed about best practices. The major roadblocks have been commission fatigue and resistance to accountability for both sides of the conflict, for example the lack of political will to transfer individuals to the ICC beyond the former president Gbagbo.
The Iran Tribunal, described previously in this report, included a second component beyond the people’s court: a TC was established in London in 2012 by civil society to examine the 1988 Political Prisoner Massacre when thousands of political prisoners were summarily executed. A variety of witnesses came forward and gave accounts. These testimonies were filmed and distributed by Farsi media, and they were widely viewed in Iran. Although not officially sanctioned, this independent TC promoted truth about abuses in a situation where no formal mechanisms are possible to advance truth.

**National Human Rights Commissions: Afghanistan’s Experience**

Empowered National Human Rights Commissions (NHRCs) can play an important role in investigations of human rights abuses, exposing the truth about past violations, and acting as a watchdog over institutions, such as the judiciary, prisons, and security services. Two practitioners who had been part of the Afghan Independent Human Rights Commission shared their experiences in a question and answer session. The AIHRC is the biggest NHRC in the world, with a broad mandate and has taken on TJ as part of building peace and rule of law in Afghanistan. In an attempt to answer whether, and if so, then how, commissions can create an opening for normative change, we highlight parts of the Q&A:

**Q:** What are the prospects for an Afghan human rights commission to promote transition and transitional justice?

**A:** The AIHRC led a national consultation with representatives randomly selected from all over the country and discussed how the population envisioned justice and redress. A report, “A Call for Justice” was written in collaboration with No Peace Without Justice and the International Center for Transitional Justice, and it listed these recommendations. This work resulted in an action plan: 1) acknowledgment of the suffering of the people; 2) memorialization of committed crimes; 3) documentation of the committed crimes to be used for prosecutions in the future; 4) vetting of national and state institutions for people who committed crimes against humanity; and 5) criminal justice. It took over a year to get this plan on the agenda of the government. Despite this roadblock, the plan of action led the AIHRC to map the conflict in Afghanistan from 1978-2001 and document human rights violations since 2001 as an effort to increase awareness about human rights abuses and promote redress. Challenges have included: access, which is limited due to security, lack of funding and insufficient support from the UN, the EU and the US.

**Q:** There is a huge amount of risk in this work, and the report is currently locked in a drawer while the president chooses not to receive it. If there is no prospect for trial and justice at the moment, what is the point of doing documentation? If the report is not made public, is there still an outcome?

**A:** Yes. This report shows respect to the victims. The AIHRC was the only body in 20-25 years to interview victims and their families, who shared their stories and pain. Because they were being interviewed by an official body, victims and families informed commissioners that they began to feel hopeful. Additionally, this report is part of the history of Afghanistan – even if it is not released now, it documents historical facts for future generations and for future prosecutions. This is historical work. Even though the
report was not published, perpetrators are getting some mental punishment because they are left wondering if they were named in the report and whether their crimes had been found out. Lastly, when this report is released, hopefully it can help other countries avoid the same mistakes.

**Q:** What do you see as an opportunity for transitional justice? Is it too soon?
**A:** Transitional justice requires political will, not only time. The AIHRC can push for this political will and the provision of justice required for building a decent society.

**EMPOWERING THE VICTIMS**

Effective TJ processes must be victim-centered, from initial planning and consultations to information gathering and producing recommendations that promote healing and redress. TJ practitioners must answer questions of whether the mechanisms and processes being used or proposed help victims come to terms with what happened and move forward, help them to feel part of society again, reignite a sense of belonging, bolster human dignity, and acknowledge their suffering. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims outlines primary goals: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

**Reparations Programs and Policies Can Be Implemented Even in the Absence of a Transition**

Among TJ mechanisms, reparations programs are most victim-centered; they provide compensation (symbolic or material, and individual or collective) and restitution in order to ameliorate victims’ suffering, and rehabilitation of victims (psycho-social support, education, employment, health) through re-socialization and re-integration. These can be achieved through the creation of new legislation, as was the case in Colombia and Mexico, but when it is not possible to pass a law, existing legislation can potentially be amended and build the capacity of institutions mandated to provide services to victims.

Questions arise as to whether reparations laws can be passed during a conflict. If so, how are victims, perpetrators, and human rights violations defined in legal terms? Are the victim registration lists open and inclusive, or not? Does it take into account needs of victims who might be impacted differently, e.g. SGBV crimes, historical, and structural injustices? These questions have immediate and radical consequences for program design and effectiveness, their inclusiveness (or rather completeness), and their ability to reach the greatest number of beneficiaries (victims, their families, and the survivors). Practitioners highlighted the experiences of three countries that had implemented reparation programs: Kyrgyzstan, Mexico and Uganda.

In the period following ethnic conflict in Southern Kyrgyzstan that took place in 2010, the State Directorate of Reconciliation and Reconstruction has given aid to almost all of the victims of the violence. Despite these grants, the process is not transparent and some see the process as corrupt. It is also highly bureaucratic with low reparation sums for victims, leading to overall distrust of the system. Civil society, though divided on the best way
forward, was engaged and included in conversations about draft legal policies and the selection of judges. However, impunity remains widespread and the government has stopped pushing for truth and justice because of a lack of will to discuss violence against ethnic minorities (80 percent of the people arrested and killed in 2010 were part of the Uzbek minority) in the lead up to the 2015 elections. This example shows that government-sponsored reparations programs must harness buy in from victims in order to be effective.

A practitioner from Mexico described the situation in his country as “pre- and post- non-transitional.” Mexico’s history of widespread human rights from the Dirty War until today has led to over 100,000 violent murders and 27,000 disappearances. Mexico has 97 percent impunity for cases of common crimes and human rights violations, and it has never had a sentence relating to torture or forced disappearances in its history. Despite this and a lack of political will, civil society has pushed for the establishment of human rights as a norm and support for TJ through domestic efforts (including constitutional reform) and regional efforts (through the Inter-American Court). Inter-American jurisprudence was important in pushing for reparations, since Mexico is not a signatory of any treaties that require the state to provide repair. In April 2012, after intense work by civil society, the Mexican congress unanimously passed a Victims Law, modeled on the Victims Law created in Colombia to provide reparations even during a pre-transition setting. The Mexican Victims Law provides a legal basis for reparations on both individual and collective levels; it also includes the right to receive protection measures such as transportation, security, etc. Concerns include: the modest national reparations fund which may not cover the entirety of cases (it receives funding from a fixed ratio of the GDP and from confiscations from perpetrators) and weak implementation of otherwise excellent laws. Currently, the law is in the critical implementation phase, and victims and civil society must monitor and report on the implementation to keep the government accountable.

A Ugandan practitioner explained that although the country has transitioned from conflict and recovery and development assistance programs were established in Northern Uganda where the most protracted conflict occurred, these programs did not include the reparative element. There has been no acknowledgment of human rights violations that lasted for 20 years. A very important question was raised about how to define victimhood in cases where victim numbers reach millions, and how to address justice needs of all the victims.

RECOMMENDATIONS

Most people understand the UN as one body and one institution, but it really is about 100 subsets with various programs and strategies -- to get the UN to work on particular issues, learn about the system and its parts. There is not enough engagement from human rights activists in UNICEF, UNESCO, UNDP, etc. that have subsets working on human rights issues.

If there is a central message by civil society in a particular country on what help is most urgently needed, the UN is more likely to listen. If CSOs do not coordinate their message, the UN will create its own strategy.

Ask for specific things. Do not simply inform, instead go with a prepared agenda and message, outline outcomes you expect, and follow up.
It is a myth that you are reaching all Special Rapporteurs (SRs) by accessing only one. They operate totally independently in terms of information that CSOs present to them. That does not mean that they cannot work with other SRs jointly, but the process should be understood.

There are various mechanisms SRs can make: make general allegations, issue urgent actions, joint allegations with other SRs. It is fundamental to understand that their role is to publicize. They do so through country visits, reports, etc.

Special Procedures -- work with them individually. Keep in touch with them, they are willing to engage.

Inviting a SR to investigate abuses as a private citizen rather than as a UN official has been a wise tactic of some of the human rights activists working in restrictive contexts.

CONCLUSIONS

Many TJ mechanisms are coming from peace agreements and accords, and often the guarantors are the UN and the AU, which makes these bodies strategic venues for civil society to push for accountability and TJ.

Kenyan example: in terms of guaranteeing a peace accord, the AU has been extremely useful. In Kenya, Kofi Annan stayed there to ensure that there was law reform and accountability. Judicial reform actually happened because they require capacity strengthening, resources, and political will.

Gather information about relevant norms and standard settings – many domestic processes rely on regional and international norms.

In regards to human rights documentation, the AU has sent human rights observers to Mali to share useful information about what is transpiring. Regional bodies can be at the forefront in ensuring that documentation is conducted so that one day this information can be used for accountability.

People should own the TJ processes. International actors may have short term interests that are not always in alignment with domestic interests. Even if their interests are aligned, it is nonetheless the people of the country who have to live with the results of a TJ process, which in itself is reason for them to own and guide those processes.

ABOUT THE ORGANIZERS

Freedom House is an independent watchdog organization dedicated to the expansion of freedom around the world. Today, as more than two billion people live under oppressive rule, Freedom House speaks out against the main threats to democracy and empowers citizens to exercise their fundamental rights. We analyze the challenges to freedom; advocate for greater political and civil liberties; and support frontline activists to defend human rights and promote democratic change. Founded in 1941, Freedom House was the first American organization to champion the advancement of freedom globally.

No Peace Without Justice is an international non-profit organization founded by Emma Bonino that works for the protection and promotion of human rights, democracy, the rule of law and international justice. In advocacy activities, NPWJ raises awareness and fosters public debate. NPWJ also undertakes wide-ranging technical assistance, through the
secondment of legal experts to governments for the drafting of legislation and to assist in negotiations on international human rights instruments. NPWJ has acquired unique field experience in “conflict mapping” and wide-scale documentation of violations of international humanitarian law in areas affected by conflicts and in implementing outreach programs engaging local communities in conflict and post-conflict areas on issues of international criminal justice.